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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM 1934.

No. 27.

HEGEMAN FARMS CORPORATION,

Appellant,

against

CHARLES H. BALDWIN, THOMAS PARRAN, JR., and KENNETH F. FEE, as Members of the Milk Control Board of the State of New York,

Appellees.

APPELLANT'S BRIEF

SAMUEL RUBINTON,
LEONARD ACKER,
Appellant's Counsel.

CASH PRESS, INC., 535 Pearl St., N. Y. Tel. Barclay 7-2670

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No. 27.

HEGEMAN FARMS CORPORATION,

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CHARLES H. BALDWIN, THOMAS PARRAN, JR., and KENNETH F. FEE, as Members of the Milk Control Board of the State of New York,

Appellees.

APPELLANT'S BRIEF.

Appeal from a decree of a Statutory Court for the Southern District of New York, composed of LEARNED HAND, Circuit Judge, BONDY and PATTERSON, District Judges, sitting as prescribed by Judicial Code, Section 266, 28 U. S. C., Section 380, which decree denied appellant's application for a temporary injunction and dismissed the complaint on the merits (R. pp. 60-61). In this brief appellant is referred to as plaintiff and appellees as defendants.

The Opinion of the District Court.

An opinion was written by Judge LEARNED HAND, in which Judges BONDY and PATTERSON concurred (R. pp. 54-57). The opinion is reported at 6 Fed. Supp. 297, advance sheets, May 14, 1934.

Jurisdiction.

The statutory provisions believed to sustain the jurisdiction of this Court are Sections 238 and 266 of the Judicial Code as amended by Act of February 13, 1925, 28 U. S. C., Sections 345 and 380.

Tyson v. *Banton,* 273 U. S. 418.
McCardle v. *Indianapolis Co.,* 272 U. S. 400.
Oklahoma Gas Co. v. *Russell,* 261 U. S. 290.

A joint statement as to this Court's jurisdiction was filed on April 25, 1934, and on May 1, 1934, the Court noted its probable jurisdiction of the case and set it down for argument for October 8, 1934.

Statement of Case.

Plaintiff is in the business of selling Grade B milk and cream at wholesale in New York City (R. p. 57). Ninety-eight to ninety-nine percent of its business consists of milk sales (R. p. 52).

Defendants constituted the Milk Control Board of New York State under Chapter 158, New York Laws of 1933 (R. p. 57). This statute, known as the Milk Control Law, was sustained by this Court in *Nebbia* v. *New York,* 291 U. S. 502. (Provisions similar to those of Chapter 158 were re-enacted by the New York Legislature in Chapter 126 of the Laws of 1934.)

Defendants were empowered by Chapter 158, Section 312 (d), to fix, by order, the minimum prices to be paid to producers for milk; and by Section 312 (b) the maximum and minimum prices that could be charged by dealers to consumers and stores, and by stores to consumers for milk handled within New York for fluid consumption. Acting under the statute, defendants made orders fixing such minimum prices. Thereafter defendants threatened

that unless plaintiff should make payments aggregating $23,000 to some 450 producers from which it had purchased its milk, from May to September, 1933, inclusive, plaintiff's license as a milk dealer would be revoked, upon the ground that it had paid less to these producers for milk than required by defendants' orders (R. pp. 7, 13, 14, 18).

This suit was then commenced to enjoin defendants from revoking plaintiff's license. Plaintiff claimed that the price-fixing sections of the statute were unconstitutional and violated plaintiff's rights under the Fourteenth Amendment to the Federal Constitution (R. p. 8). Plaintiff further claimed that the price-fixing orders made by defendants, which plaintiff was charged with violating, were unconstitutional and in violation of plaintiff's rights under the Fourteenth Amendment, since the prices fixed were such as to prevent plaintiff from earning a fair return on the present reasonable value of its properties (R. pp. 10, 11).

The court below, in accord with plaintiff's claim, in its findings of fact found:

> "13. The difference between the prices fixed by the defendants as the minimum prices which plaintiff must pay for milk purchased by it from producers, and the prices at which such milk could be sold whether in the form of Grade B milk or fluid cream, has at all times been and now is insufficient in amount to afford plaintiff a fair return on the present fair value of the properties devoted by it to its milk business less depreciation" (R. p. 59).

The court, nevertheless, held that plaintiff was entitled to no relief.

Provisions of the Statute Providing for the Fixation of Prices.

Section 312 of the Milk Control Law provides that the Milk Control Board shall make investigations as to what

prices will best protect the milk industry of New York State, and that:

> "(b) The board after making such investigation shall fix by official order the minimum wholesale and retail prices and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state for fluid consumption, and wheresoever produced, including the following classes:
>
> 1. By milk dealers to consumers.
>
> 2. By milk dealers to stores either for consumption on the premises or resale to consumers.
>
> 3. By stores to consumers except for consumption on the premises where sold.
>
> * * * * * *
>
> (d) The board after making such investigation * * * may fix by official order the minimum prices to be paid by milk dealers to producers and others for milk of the various forms included within the definition of milk as used in this article and its various grades and uses."

The statute contains a special provision for dealers handling milk which has not a well advertised name, and as to them provides, Section 317 (c):

> "(c) It shall not be unlawful for any milk dealer who, at the time this act shall take effect, is engaged in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants, to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed by the board for such sales to stores in such a city."

Plaintiff sells no milk under a well advertised trade name (R. p. 48) and so comes within the provisions of Section 317 (c).

(Similar provisions with respect to the fixation of prices and with respect to the sales of unadvertised milk were enacted by the New York Legislature in Sections 258 (m) and 258 (q) of Chapter 126 of the Laws of 1934.)

The Orders of Defendants Fixing Prices.

Defendants fixed $1.88 per 100 pounds as the price to be paid by dealers to producers for milk containing 3.5% butter fat, plus an additional $.04 per hundred pounds for each additional 1/10th of 1% of butter fat content, when the milk being purchased was ultimately to be used for consumption as fluid milk, and $1.30 per 100 pounds for milk that was ultimately to be used as fluid cream. These prices were applicable to milk purchased in the territory known as the 200-210 mile zone, that being the distance of the territory from New York City, and that being the territory in which plaintiff made its milk purchases. These prices were in effect from May 16, 1933, until July 21, 1933 (R. pp. 8, 9, 19, 31).

From July 21, 1933, to the end of the period which is in controversy in this suit, the price to be paid for milk which was ultimately utilized as fluid milk and which was purchased in the 200-210 mile zone was fixed by defendants at $2.23 per hundred pounds plus a $.07½ charge which was designated as a freight differential, plus $.04 for each additional 1/10th of 1% of butter fat content over a content of 3.5%, and for milk which was to be used as cream, $1.55 per 100 pounds (R. pp. 9, 20, 31).

Defendants fixed $.09 per quart as the minimum selling price for grade B milk from dealers to stores and restaurants, the class of business in which plaintiff, as a wholesale dealer, is engaged. This price was in effect from May 15th to July 21st. After July 21st the price was fixed at $.10 per quart (R. p. 30).

Plaintiff comes within the class of dealers not selling well advertised milk, and by the statute and the orders of defendants was permitted to sell its milk for one cent a quart less than the sales prices so fixed in defendants' orders (Finding of Fact No. 10, R. p. 58).

Defendants fixed $.27, $.39 and $.45 per quart as the prices for which cream could be sold at wholesale from May 16th to July 21st, 1933, and after July 21st, $.31, $.44 and $.53 per quart (R. p. 10). The variance in the prices of cream depended upon differences in the butter fat content (R. p. 10).

The Threatened Revocation of Plaintiff's License.

On December 29th and December 30th, 1933, defendants ordered plaintiff's license as a milk dealer revoked unless it should pay varying amounts to the different producers from which it had purchased its milk during May to September, 1933, inclusive, so as to bring the total payments to each producer up to the minimum purchase prices fixed by defendants (R. pp. 13, 14). The total payments required to be made by defendants' orders aggregate $23,000, which plaintiff would have to pay to 450 producers (R. pp. 17, 18).

Specification of Errors.

The District Court erred in making each of its conclusions of law herein, to wit:

1. In holding Chapter 158 of the Laws of 1933 of the State of New York constitutional insofar as said statute is involved in the present action;

2. In ruling that no reason appeared for holding unconstitutional the orders of defendants involved in the within suit;

3. In denying plaintiff's application for a temporary injunction, and in dismissing the complaint.

Summary of Argument.

I. The orders of defendants fixing prices for the purchase and sale of milk, which plaintiff was charged with violating, are unconstitutional since the prices fixed were such as to prevent plaintiff from earning a fair return on the present reasonable value of its properties less depreciation.

There is no difference in economic or legal principle between a rate which fixes a maximum selling price and prevents a fair return as in the usual "rate" case and defendants' price-fixing orders.

The effect of defendants' orders is to force out of business the small dealers and to leave the field to a few large companies, and this result will frustrate the very purpose of the statute.

No fair analogy is presented between sanitary health measures and defendants' confiscatory price-fixing orders.

It does not follow from the premise that the state may regulate the prices of milk as part of its police power that it may in the course of such regulation impose rates which are confiscatory.

The spread between the price which the dealer must pay the ~~purchaser~~ producer and the "minimum" sales price fixed in defendants' orders, which competition in practice makes the maximum sales price, should be such as to afford a fair return to efficiently managed units.

II. The purpose and effect of the New York Milk Control Statute is to deprive the milk producers of other

states of the competitive advantage over New York producers possessed by them. The law therefore discriminates against the products of other states and is unconstitutional.

III. Plaintiff did not waive its right to attack the constitutionality of the statute or of defendants' orders by applying for a license under the statute.

POINT I.

The orders of defendants fixing prices for the purchase and sale of milk, which plaintiff was charged with violating, are unconstitutional, since the prices fixed were such as to prevent plaintiff from earning a fair return on the present reasonable value of its properties less depreciation.

The present fair value, less depreciation, of the plaintiff's properties devoted to its business is over $450,000 (R. pp. 5, 6; Finding of Fact No. 5, R. p. 58). This figure represents the present replacement value of the physical properties, less depreciation, and does not take into consideration either good will or "going concern value" (R. p. 16).

The New York Legislature has treated the milk industry as one affected with a public interest and has subjected to governmental regulation the prices which must be paid and may be charged for milk. When a state thus regulates the prices for which a commodity or service may be sold, it is settled by repeated decisions of this Court that the rate fixed must afford a fair return upon the value of the properties devoted to the business or else the rate will be deemed confiscatory, invalid and in contravention of the constitutional inhibition which prevents the taking of property without due process of law.

Los Angeles Gas Co. v. *R. R. Comm.*, 289 U. S. 287, 305.
United Rwys. v. *West.*, 280 U. S. 234.
McCardle v. *Ind. Water Co.*, 272 U. S. 400.
Board of Public Utility Commissioners v. *New York Telephone Co.*, 271 U. S. 23.
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Pacific Gas Co. v. *San Francisco*, 265 U. S. 403.
S. W. Tel. Co. v. *Public Service Comm.*, 262 U. S. 276, 289.
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Miss. R. R. Comm. v. *M. & O. R. R.*, 244 U. S. 388, 391.
Smyth v. *Ames*, 169 U. S. 466.

Defendants' orders established a minimum price which plaintiff must pay to producers.

The orders also established a price at which plaintiff's milk could be sold. The sales price was designated as a minimum price. In actual practice, however, the "minimum" sales price was the maximum price at which plaintiff could sell its milk. This is due to the keen competition in the wholesale milk business in New York City, because of which plaintiff would be unable to sell any of its milk if it sought to charge more than the price designated in defendants' orders (R. p. 21).

That the so-called minimum sales price in defendants' orders is also a maximum price was recognized both by the New York legislature and by defendants. The legislature by Section 317 (c) of the law, and defendants by their orders (R. p. 49), permitted vendors of unadvertised milk to sell at one cent a quart less than advertised brands. Both the legislature and defendants thereby recognized that dealers in unadvertised brands, such as plaintiff, could not get for their product even the one cent more per quart that the dealer in an advertised

brand could obtain for its milk. Both the legislature and defendants thereby affirmed that the lesser price was the greatest price that the dealer in unadvertised milk could secure for its product.

The learned District Court accordingly found as a fact:

> "11. The competition offered by other milk dealers in New York City prevented and prevents the plaintiff from selling milk at prices greater than the minimum price fixed by the defendant" (Finding of Fact No. 11, R. p. 59).

Plaintiff's Operating Costs.

Milk is delivered to wholesale dealers in 40-quart cans, which are the units used in calculating costs, operating expenses and receipts rather than the 100 pounds which is used as a unit in the statute for fixing the purchase price of milk (R. p. 22).

During the period in controversy the following figures were applicable to plaintiff's business (R. pp. 22-24):

	May 16 to July 21, 1933	*July 21 to Sept. 30, 1933*
Cost per can (as fixed by defendants' orders)	1.632	1.99325
All operating expenses	1.5738	1.5778
Total cost of milk to plaintiff	3.2058	3.57105
Amount received by plaintiff per can (allowing ½ quart per can for unavoidable spillage), being the price fixed in defendants' orders, which the District Court found competition made the highest price realizable	3.16	3.535
Loss per can	.0458	.01605

Plaintiff's Operating Costs Were Proper.

The operating costs of plaintiff are very reasonable and indicate a well managed and efficient business unit. This is shown by a report upon milk wholesalers' operating costs for August, 1933, prepared for defendants by Professor Leland Spencer of Cornell University. Professor Spencer was research director of the Joint Legislative Committee appointed to investigate the milk industry in New York State, and the report of which committee, Legislative Document (1933) No. 114, preceded the enactment of the Milk Control Law. The report of the committee is referred to by this Court in its opinion in *Nebbia* v. *New York,* supra.

The report of Professor Spencer shows the following operating costs per quart of milk for August, 1933, one of the months involved in this suit, for thirty wholesalers in New York City (R. p. 24):

Freight	.0063
Plant Costs	.0093
Selling and Delivery	.0293 .0239
General and Administrative	.0018
Total Operating Cost	.0413

The total operating cost shown by Professor Spencer's report is equal to $1.652 per 40 quart can which is $.0782 per can more than plaintiff's costs from May 16th to July 21st, and $.0742 more than plaintiff's costs after July 21st.

The propriety of plaintiff's costs and the efficiency of its operation are likewise demonstrated by the report of the Joint Legislative Committee. According to the report, page 196, the average cost of operations for sales of fluid milk for twenty-nine dealers during April, 1930, was $.0509 per quart, and for April, 1932, $.0477 a quart. This amounts to $2.036 per 40 quart can for April, 1930, and $1.908 for April, 1932. The April, 1930

and 1932 average costs of operation as shown in the Joint Legislative Committee's report were, therefore, considerably higher than plaintiff's costs of operation during the period in controversy, and there was no appreciable decrease, if any, in costs of operation between April, 1932, and May to September, 1933, the period in controversy.

In calculating its gross return, plaintiff allows a loss of one-half quart out of each 40 quart can, due to unavoidable spillage in handling (R. p. 23). This is 1¼% of the milk handled, and is very reasonable for the average loss in handling is 2.2% (Report of Joint Legislative Committee, p. 200).

There is indeed no question as to plaintiff's inability to earn a fair return in view of defendants' price fixing orders. The District Court found, upon the stipulation of the parties, that the difference between the price which plaintiff must pay for its milk and the price at which the milk could be sold was "insufficient in amount to afford plaintiff a fair return" (Finding of Fact No. 13, R. p. 59).

The decision of the District Court turned, not on the proposition that plaintiff was able to earn a fair return, but upon the theory that the Federal Constitution afforded no protection against the confiscatory orders since it was within the police power of the state to regulate the prices of milk (Opinion, R. pp. 56, 57).

There is no difference in economic or legal principle between a rate which fixes a maximum selling price and prevents a fair return as in the usual "rate" case and defendants' price-fixing orders.

The price which plaintiff must pay for its milk is fixed by defendants' orders. The orders also fix a sales price, designated as a "minimum" price, but which competition makes a maximum sales price. Theoretically plaintiff could sell its milk at any price, but actually competition fixed the designated "minimum" price as the highest sell-

ing price. The "spread" between the purchase price fixed by defendants and the selling price which economic forces fixed at the minimum selling price designated by defendants is insufficient, as the District Court found, to afford to plaintiff a fair return. This, in principle, is exactly the situation in every "rate" case in which a rate is held unconstitutional.

In the usual "rate" case a price, fixed as the maximum which may be charged for a commodity or service, is attacked as confiscatory. In such cases this Court has repeatedly held that the rate must be such as to yield a fair return over the amount necessary to pay taxes and proper operating expenses.

In the usual "rate" case the utility is unable to earn a fair return, when an order or statute fixes the selling price too low, because its costs of operation as fixed by competitive forces are such that the spread between cost and selling price is insufficient. In such case the sales end of the spread is fixed by governmental regulation and the other end by economic forces alone.

In the present case the spread is likewise insufficient because competition, together with the governmental regulation, fixes one end of the spread—the selling price—and governmental regulation alone fixes the other—the cost of the article being sold.

The only difference between the usual "rate" case and the present suit is that a different end of the spread is exclusively fixed by the governmental regulation, but there is no distinction in economic principle and there should be no difference in legal result. In each case competition fixes one end of the spread and governmental regulation the other.

Here, moreover, the sales price is fixed by competitive forces at the so-called minimum price designated by defendants' orders.

In this case as in the usual "rate" case it is the governmental regulation, in addition to ordinary business risks, which affects the return. There should be no different

legal result in the two cases merely because the regulation is imposed at different places in the train of business events, for the effect upon the business is the same.

There is no difference between the position of a utility which buys in a competitive field and which must sell at a price fixed by law, and the position of dealers such as plaintiff, which must buy at a price fixed by law and must sell at a price which competition fixes at the minimum sales price of defendants' orders. In each case one end of the spread is fixed by competitive forces, and the other end by governmental regulation, and the rule which is applied in the one case should equally be applied to the other.

This Court has uniformly held that when governmental regulation is applied to one end of the spread between cost and selling price, the application must not be such as to prevent the vendor from earning a fair return. The decision below disregards this principle, established in a long line of "rate" cases, and its affirmance would, in effect, overrule that principle.

The District Court took the view that this suit presented no more than the case of a milk dealer faced with competition, unable to sell its milk above the price fixed by that competition, and thus unable to earn a fair return. This view overlooks that the statute and defendants' orders took from plaintiff the power it previously possessed to bargain with milk producers as to the purchase price of milk. It is the governmental regulation of plaintiff's purchase price together with the competition which fixes the sales price at the minimum sales price of defendants' orders that prevent plaintiff from earning a fair return. It is the ordinary business risk for a vendor to be unable to make a fair return by reason of competition alone and to be forced out of business, but an altogether different proposition for the state to intervene and by means of price regulation to prevent the vendor from making a fair return and to destroy his business. This essential distinction was not recognized by the District

Court which refused to apply the rule of the "rate" cases, since one end of the spread between plaintiff's purchase price and sales price was fixed by competition. The District Court's decision flies square into the face of the numerous decisions of this Court in "rate" cases. Were the view of the District Court sound, then in every "rate" case the complaint would have to be rejected upon the simple ground that the spread between the cost and the sales price of the commodity or service being sold was insufficient to afford a fair return not because the sales price was fixed too low by governmental regulation, but because competitive forces fixed the costs at too high a level.

The effect of defendants' orders is to force out of business the small dealers and to leave the field to a few large companies, and this result will frustrate the very purpose of the statute.

The District Court, in line with its point of view that plaintiff was prevented from earning a profit solely because of competitive forces, ruled that plaintiff could not complain even though the effect of defendants' orders was to destroy its business and property, as well as the businesses and properties of other dealers, similarly situated, since eventually some milk dealers would weather the period of "adjustment" during which plaintiff and other dealers like it were being destroyed, and the selling price would eventually become higher so as to enable a profit to be made by the surviving companies.

The court, pointing out the destructive effect of defendants' orders, said:

> "On the other hand some selling units may have to be eliminated, the 'marginal producers'; a reduction in production will follow and almost always a rise in price. * * * The first effect may be to make all sell at a loss and there may be a marked lag before any adjustment, but plainly the loss can-

> not be permanent and general, or the trade will perish. The most that plaintiff can ask of us is to assume that in the eventual accomodation it will prove one of the weak selling units and will go to the wall" (R. p. 55).

The District Court erroneously assumed that plaintiff was a "marginal producer" being forced out of business by competition. Plaintiff is not at all like a marginal producer who is forced "to the wall." Quite to the contrary plaintiff, and others like it, that are being forced "to the wall," are small organizations, which, irrespective of the efficiency of their management, have not the financial resources to withstand a protracted period of operating at a loss. A marginal producer is one whose costs, per unit, of the commodity produced or sold by him, are so high as compared to others in the same business, that he cannot continue in business at a profit when, due to competition, there is any reduction in the sales price. Plaintiff, far from being a marginal producer, is a business unit whose costs of production are appreciably lower than the average.

In the present case it is not only the "marginal producer" which is losing money due to defendants' orders, but even those units which are so efficiently managed that their costs per unit of commodity sold are far below the average cost.

The situation is one in which all milk dealers must buy at one price—the price fixed in defendants' orders—and must sell at one price—the "minimum" sales price fixed by defendants' orders, since competition makes that minimum price likewise a maximum sales price. All milk dealers, whether they operate their businesses efficiently or not, are losing money during the "adjustment" period referred to by the District Court—the period during which some businesses will be destroyed.

The units which will be destroyed are not the "marginal producers" but those not sufficiently fortified financially to withstand operating at a loss for an extended period.

Comparatively small units such as plaintiff will be forced out of business during the "adjustment" period even though they are efficiently operated. On the other hand, the bigger and stronger organizations, being well fortified in a financial way, will survive the "adjustment" period although they be not so efficiently managed.

Three large companies already sell two-thirds of the milk distributed in New York City (Report of Joint Legislative Committee, p. 165). Defendants' orders will eliminate the numerous small dealers now operating in New York City and leave these few large companies with a monopoly of distribution.

The courts never before have permitted a state to confiscate the property of numerous small business men by imposing rates that prevent operations at a profit, upon the theory that they have no complaint since in the long run a few strong organizations will survive, which, with competition removed, will be enabled to increase prices to the ultimate consumer. Yet that is the principle upon which the District Court justified defendants' orders. The court said:

> "Surely it is a mild assumption that the more vital interest in the end may demand that there should be less goods sold at higher prices, rather than that all existing manufacturers should remain in business" (R. p. 56).

A state may not properly impose confiscatory rates merely because they will not destroy the entire industry, but will eventually lead to a monopolistic control of the market and a higher price to the ultimate consumer.

Indeed, in *Borden's Farm Products Co.* v. *Baldwin*, not yet reported, a Statutory Court, likewise sitting for the Southern District of New York, composed of LEARNED HAND, Circuit Judge, GODDARD and COXE, District Judges, in passing upon certain provisions of Chapter 126 of the New York Laws of 1934, which statute is substantially the

ame as the statute now before the court, ruled that the ublic policy of New York is to prevent and not foster nonopoly. In that case the Borden Company attacked, as n arbitrary and unconstitutional classification, the provi-ion of the Milk Control Law which permitted unadvertised nilk to be sold at one cent a quart less than advertised rands. The District Court recognized that the basis of he classification was that unadvertised milk would be orced out of the market by the well-known brands if t had to be offered for sale at the same price, and that he purpose of the classification was to afford vendors f unadvertised brands an opportunity to remain in usiness. The District Court further held that such pur-ose sustained the classification in view of the settled ublic policy against monopoly.

In the *Borden* case, Circuit Judge LEARNED HAND, writ-ng for the unanimous Court, said:

> "The situation here was such that the legislature might fear that the larger dealers would gather into their hands substantially all sales of milk to stores; just as they already had gathered direct sales to consumers. If the 'independents' had to sell at the same minimum, the public would probably choose the well-known brands; at any rate that was a reasonable possibility, to be provided against if the result was undesirable. Perhaps it was not; it may be better to allow the four larger companies to take full advantage of their advertising, of their reputation for cleanliness and quality; certainly it is true that the statute seeks to take from them economic advantages which were not only theretofore lawful, but which have generally been commended and fostered. But the consequences of allowing these advantages their full effect would probably, or at least it might, eliminate the 'independents' from that part of the market which fed stores. If it did, the whole market would fall into few hands. That might be a good thing, or it might be a bad; but concentration of economic

> power has generally been watched with a jealous eye in this country. To prevent it or to break it up, rather than to regulate it after it arises, has on the whole been our preferred way; and in this instance competition between the four 'well-advertised' dealers, might be thought not enough security."

In the present case the District Court followed an entirely different line of reasoning when they held that the state could validly destroy the property and businesses of numerous small dealers because in the end some strong organizations would survive. In this suit the District Court sustained defendants' orders, although they recognized that a monopoly would probably be effected by them, whereas, in the *Borden* case the same Court recognized that the New York Legislature did not intend a monopoly of distribution to be brought about by the statute, and had therefore inserted special provisions to forestall any monopoly.

Defendants' orders thus tend to bring about a monopoly, an evil which the legislature sought to prevent by specific provisions in the statute, and they furthermore are in contravention of the basic purpose of the statute since they tend to destroy the small dealers and to leave the business of distributing milk in the hands of a few large organizations.

The primary purpose of the statute, under which defendants issued their orders, is the protection of the dairy farmers of New York (Report of Joint Legislative Committee, pp. 13, 14). The statute itself provides (Section 312 [c]):

> "* * * that the benefits of any increase of prices received by milk dealers by virtue of the minimum price provisions of this section shall be given to producers."

The factor in the production of milk in New York State which resulted in dairy farmers being affected

by the current economic depression to a greater degree than other businesses is the production at all times of a surplus of milk over the consumers' requirements for fluid milk, which surplus cannot be sold by the producer at a profit. This surplus must be at all times maintained because milk is a necessary food, the demand for which varies from day to day and from season to season.

Nebbia v. *New York*, supra.
Report of Joint Legislative Committee, pp. 15, 16, 38, 40, 77, 78.

The effect of defendants' orders, as recognized by the District Court, is to force out of business those dealers unable to operate for any extended period at a loss. The resultant monopoly of distribution in the hands of a few large companies will tend to destroy large numbers of milk producers for two reasons.

In the first place, the inevitable effect of a monopoly of distribution will be an increase of the price of milk to the consumer. Such increase in price will bring about a decrease in consumption, for it is axiomatic that an increased price results in decreased consumption, as the District Court recognized (R. p. 56). The principal difficulty which the milk producer now faces is the presence of a large surplus over fluid needs and such decrease in the consumption of milk will serve to aggravate the very evil which the statute is intended to alleviate.

In the second place each milk dealer represents an outlet for the production of numerous dairy farmers. The necessary consequence of eliminating a number of milk distributors will be the destruction of the outlets relied upon by great numbers of dairy farmers for the sale of their product. With the outlet for their milk gone the investments of great numbers of dairy farmers will be jeopardized or destroyed. Dairy farmers whose customary outlets are destroyed by the operation of defendants' orders will be unable to find new profitable outlets

for their production since the dairy farmers of New York already produce more milk than can be profitably sold. The distribution of milk as a result of defendants' orders will become centered in the hands of a few large companies which are already fully supplied by their own producers (Report of Joint Legislative Committee, pp. 108, 132). Even if new outlets for their production could be found, the dairy farmers would in all probability be unable to survive any extended period during which they would be compelled to seek such new outlets and during which they could not dispose of their production. Such loss of outlet leading to a curtailment of the dairy industry would likewise lead to the abandonment of large areas of land in New York State (Report of Joint Legislative Committee, p. 31).

In *Borden's Farm Products Co.* v. *Baldwin*, the District Court recognized that the effect of eliminating ~~producers~~ dealers would likewise be to curtail the market in which the dairy farmers could sell their product. In sustaining the provision which permitted unadvertised milk to be sold at a lesser price than well known brands, the court said:

> "Further, it seems to us that the section may have been thought to fit in with the major purpose of the statute, which was to relieve the dairy farmer by insuring him a better price without reducing his market. His price was fixed for all 'Independents' and 'well-advertised' dealers alike; but the amount of milk sold might vary with the price to the consumer, at least that is true for most commodities. The attempt was not to fix two prices in the same market for the same commodity; the hypothesis is that to the public a well-known brand is of different quality. If this proves true, the several brands will sell together, the cheaper will not drive out the dearer. The result will be, or it may be—for we must deal only in possibilities—that more milk will be marketed than if the fixed price were uniformly maintained, though less than if it were lowered."

Defendants' orders, therefore, tend to bring about a result exactly contrary to the paramount purpose of the statute, for they tend to destroy great numbers of milk producers, whereas, the statute was enacted primarily for the preservation of the milk-producing industry of New York State.

The rule is firmly established by the decisions of this Court that a statute is valid only if "the means selected shall have a real and substantial relation to the object sought to be attained".

Nebbia v. *New York*, supra.
Adair v. *United States*, 208 U. S. 161.

This rule should apply equally to administrative orders issued under a statute, such as defendants' orders, and one of the tests of the constitutionality of defendants' orders properly is whether they have a "real and substantial relation to the object sought to be attained". Instead of any such relationship to the object sought to be attained the orders of defendants have exactly the opposite effect for they tend to defeat the purpose of the very statute which empowered their issuance.

No fair analogy is presented between sanitary health measures and defendants' confiscatory price-fixing orders.

The District Court took the view that plaintiff had no more standing to complain of defendants' confiscatory orders than it would have to complain of a law which provided for "improvements in working conditions, or in the hygienic quality of the product" which would increase expenses of operation (R. p. 56).

It is true that a sanitary ordinance which, for example, required the washing of bottles or the pasturization of milk would be a regulation of the use of plaintiff's property and that defendants' orders are likewise a regulation of the use of plaintiff's property, but it does not follow

that because the one type of regulation would be valid that every type is valid. The difference in degree between the inhibitions upon the use of plaintiff's property created by a sanitary ordinance and the inhibitions created by defendants' orders is so great that the two types of regulation must be regarded as falling into entirely different categories.

In testing the validity of a measure which regulates the use of private property, it is the degree of regulation which is the important consideration and not the solitary factor that the law is a regulatory one. *Penna. Coal Co.* v. *Mahon,* 260 U. S. 393, 415. Thus statutes which regulate the height and type of buildings which may be erected, such as zoning laws, are sustained as valid exercises of governmental authority, but it would be an altogether different proposition for a state or municipality to prohibit owners from putting their land to any use whatever, without compensation to the owners. *Penna. Coal Co.* v. *Mahon,* supra. Yet, such statute, like the ordinary zoning law, is one that regulates the use of real property and which is distinguishable from the usual law only by the degree of regulation. Even the usual zoning law has been treated as invalid in its application to a particular owner when its operation is such as to deprive such owner of all beneficial use of his property.

Eaton v. *Swecney,* 257 N. Y. 176.
Dowsey v. *Village of Kensington,* 257 N. Y. 221.

So in the present situation, it is one thing to enact sanitary requirements which are necessary for health purposes and an altogether different thing to issue orders under a law whose purpose is to protect milk producers, which orders prevent milk dealers from earning a fair return and which will have the effect of forcing numerous small dealers out of existence. A sanitary law does not disturb the power of entrepreneurs to bargain with respect to both the purchase price and the sales price

of the commodity in which they deal, and their bargains may be made so as to adjust their businesses to the additional costs imposed by the sanitary regulation. In the present case, quite to the contrary, the confiscatory effect of defendants' orders cannot be met by adjustments in bargaining, for one end of the dealers' spread, viz: the buying end, is fixed by law, and in actual practice the other end of the spread is fixed by competition at the "minimum" sales price designated in defendants' orders.

A regulation which fixes the price of the very commodity which the dealer is handling destroys his bargaining power and leaves him powerless to earn a profit when, as here, the rates fixed are confiscatory, whereas, the sanitary regulation in no manner affects the bargaining power in relation to the commodity being handled. There is no valid basis for the assumption of the District Court that defendants' orders are valid because sanitary ordinances which have increased operating costs have been upheld.

It does not follow from the premise that the state may regulate the prices of milk as part of its police power that it may in the course of such regulation impose rates which are confiscatory.

The District Court held that since the state was privileged to regulate milk prices as part of its police power plaintiff could not complain of defendants' orders even though the orders prevented plaintiff from earning any profit and would destroy plaintiff's business.

The court said (R. p. 56):

> "The 'Police Power' was sometimes spoken of as though it concerned only 'health and safety'. That mode has disappeared; the purpose of the State of New York to preserve its dairy industry may involve remote repercussions as mortal to some individuals, as its purpose to abolish sweatshops; but

> once it be agreed that the state may interpose for either end in the 'free play of supply and demand,' the incidents follow. It is not critical that some will find themselves unable to withstand the pressure and will collapse.
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> * * * * * *
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> Just as it (the plaintiff) is exposed to the rubs of competition in what it buys on an uncontrolled market, and must make such fetch to adjust as it can, so it must accommodate its dealings to a price fixed, as we now know, in the plenitude of municipal power. That power once granted, its transmitted disturbances the Fourteenth Amendment does not neutralize" (R. p. 57).

In *Nebbia* v. *New York,* this Court sustained the regulation of milk prices as within the police power of the state, but the power to regulate rates does not imply the power to impose confiscatory rates.

This Court has established the rule that the police power as well as the other governmental powers of the states are subject to the limitations of the Federal Constitution.

In *Southern Railway Co.* v. *Virginia,* 290 U. S. 190, the Court, holding invalid a Virginia statute which effected a taking of property without due process, said:

> "The claim that the questioned statute was enacted under the police power of the State and therefore is not subject to the standards applicable to legislation under other powers, conflicts with the firmly established rule that every state power is limited by the inhibitions of the XIV Amendment" (Citing cases) (p. 196).

See also to the same effect:

> *Adkins* v. *Children's Hospital,* 261 U. S. 525, 549.
> *Atchison & Santa Fe Ry.* v. *Vosburg,* 238 U. S. 56.

Grenada Lumber Co. v. *Miss.*, 217 U. S. 433, 441, 442.
Walling v. *Michigan*, 116 U. S. 446, 460.
New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S. 650, 661, 662.

In every case in which a state is allowed to fix the rates which may be charged for a commodity or a service, the underlying theory is that such fixation of rates is a part of the police power of the state.

Union Dry Goods Co. v. *Georgia P. S. Comm.*, 248 U. S. 372, 375.
German Alliance Insurance Co. v. *Kansas*, 233 U. S. 389.

In the *Union Dry Goods Co.* case, this Court said:

> "* * * capital invested in an electric light and power plant to supply electricity to the inhabitants of a city is devoted to a use in which the public has an interest which justifies rate regulation by a state in the exercise of its police power" (pp. 374, 375).

Nevertheless, this Court, while sustaining the power of the states to fix rates in connection with various businesses, has uniformly adhered to the rule that the rates must afford a fair return.

Defendants' orders do not, in fact, tend to promote the public welfare, and their effect is to contravene the purpose of the Milk Control Law. But even though they were beneficial to the public instead of detrimental, such fact would not validate them, in view of their confiscatory nature. As stated by Mr. Justice Holmes in *Penna. Coal Co.* v. *Mahon*, supra:

> "* * * a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change" (p. 416).

And in *Paducah* v. *Paducah Ry.*, 261 U. S. 267, 272, this Court pointed out that there is a constitutional right to a fair return on property when the use of such property is subjected to rate regulation, and that unless contracted away such right:

> "may not be overridden by legislative enactment or considerations of public policy" (R. p. 272).

The economic philosophy and theory underlying the federal legislation enacted during the present national administration, commonly known as "The New Deal", does not in the slightest justify the taking of the property of one group of citizens for the benefit of another group, and so would not in any wise justify the confiscation of the property of plaintiff and of other small dealers for the benefit of the dairy farmers, assuming, contrary to the fact, that defendants' orders had any such beneficial effect.

In the Green Bay, Wisconsin, address of President Roosevelt of August 9, 1934, he stated in part:

> "This Government intends no injury to honest business. The processes we follow in seeking social justice do not in adding to general prosperity take from one to give to another. In this modern world, the spreading out of opportunity ought not to consist of robbing Peter to pay Paul."

The President's statement reiterates the constitutional principle established by this Court, that a state may not take the private property of one person for the benefit of another.

> *Missouri Pacific Ry.* v. *Nebraska*, 164 U. S. 403, 417.

There is nothing in *Nebbia* v. *New York*, supra, which in the slightest shows that this Court intended a different principle to apply to the rates that could validly be imposed in connection with the milk business than has

been applied by this Court in the usual "rate" case. Indeed, the opinion of the Court indicates just the contrary. In sustaining the power of the state to regulate milk prices for the promotion of the public welfare, the opinion of Mr. Justice ROBERTS stated that due process demands:

> "* * * that the law shall not be unreasonable, arbitrary or capricious" (p. 525).

If the law which the state may pass must be reasonable and not arbitrary in order to conform to due process, then by a parity of reasoning the orders which administrative officials may make under the law must conform to the same standard. Certainly an order which in its operation is confiscatory, which forces out of business efficiently operated organizations, which tends to bring about monopoly, increased prices and decreased consumption, and which defeats the purpose of the statute under which it is issued, is "unreasonable" and "arbitrary."

If defendants may validly make orders which prevent plaintiff from earning a fair return, although it is an efficiently managed unit which operates at less than the average cost, then by the same token a public service commission, under a law permitting the regulation of rates for electricity, may fix a rate of one cent a kilowatt hour, even though it cost a company, operating at maximum efficiency, five cents a kilowatt hour to supply the electricity. Such result would be startling to say the least but it is the necessary sequence of the District Court's holding that plaintiff has no complaint with respect to defendants' orders, since the state may regulate milk prices as part of its police power.

It is highly significant that the report of the Joint Legislative Committee in discussing the power of the state to fix prices for milk (pp. 271-295) recognizes that any regulatory statute would fall into the same category as statutes fixing rates for utilities, and that the prices fixed would have to be such as to afford a fair return. The

legislative committee's report reads in this respect (p. 289):

> "Necessary Provision in Price Fixing for a Fair Return on the Investment in the Public Utility
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> Price fixing cannot preclude a fair return, and reduction below this is confiscation, Municipal Gas Co. v. Public Service Commission, 225 N. Y. 89, page 95, citing:
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> Smith v. Ames, 169 U. S. 466.
> Minnesota Rate Cases, 230 U. S. 352, 434.
> Missouri v. Chicago, Burlington & Quincy R.R. Co., 241 U. S. 533.
> Rowland v. St. Louis & S. F. R. R. Co., 244 U. S. 106.
> City & County of Denver v. Denver Union Water Co., 246 U. S. 178.
> Willcox v. Consolidated Gas Co. of N. Y., 212 U. S. 19.
>
> A fundamental theory of public utility regulation is that there shall be but one rate for the same service. Such a rate must be one which will enable the public utility to realize the expense of operating, meeting its financial obligations for investments with reasonable excess for dividends, etc. The price fixing regulation could be confined to distributors' spread or it might be extended to fixing the price for purchase and sale of milk. The Court would have the ultimate right to determine judicially the fairness of the return. A return which is not fair based on the proper factors entering into the question, might be regarded as confiscatory and unconstitutional in taking one's property without due process of law."

The legislative committee thus realized the limitations which this Court has affixed to the exercise of the rate making power of the states, but the District Court ignored these limitations.

The spread between the price which the dealer must pay the purchaser and the "minimum" sales price fixed in defendants' orders which competition in practice makes the maximum sales price, should be such as to afford a fair return to efficiently managed units.

In the usual "rate" case the business to which the rate is applied is in the nature of a monopoly so that each business unit can be treated separately in determining whether a rate is fair.

In the field to which the New York Milk Control Statute applies the same method of treatment is impossible as a practical matter, for the field is highly competitive and there are great numbers of dealers.

Defendants' orders fix a minimum buying price which is the lowest price at which milk may be purchased from producers, and a so-called minimum selling price, which competition in actual practice makes likewise the maximum sales price, since some dealers will always attempt to sell at that price in an endeavor to capture trade. With some dealers selling at the minimum price fixed in defendants' orders, plaintiff and others in its position would be unable to sell their product should they offer it for a higher price.

The orders regulating prices should properly allow such spread between the buying and selling prices as will allow an efficiently operated business unit to earn a fair return upon the reasonable value of its properties. When the state regulates prices in a competitive field in which there are a great number of entrepreneurs, then, efficiently managed units, whose operating costs are, therefore, proper operating costs, should be permitted to complain of rates that prevent a fair return from being earned despite the efficiency of management.

Unless such rule be adapted, the effect of rate regulation in competitive fields will be the elimination of small units and the fostering of monopoly, a result contrary to

all previous concepts of public policy and welfare and violative of established American tradition.

Plaintiff's costs of operation are less than the average so that it is an efficiently managed business unit which rightfully should be permitted to complain of defendants' orders since defendants' orders prevented plaintiff from earning any profit despite the efficiency of its management.

POINT II.

The purpose and effect of the New York Milk Control Statute is to deprive the milk producers of other states of the competitive advantage over New York producers possessed by them. The law therefore discriminates against the products of other states and is unconstitutional.

In *Nebbia* v. *New York,* this Court sustained the New York Milk Control Statute as a valid exercise of the state's police power. There are some constitutional problems with respect to the law that apparently were not presented to or considered by the Court in that case, so far as appears from the majority and minority opinions, and we respectfully submit them for the consideration of the Court.

The chief difficulty which confronts the New York milk producer is the production of a surplus over the fluid milk requirements of the consumers of the state.

> *Nebbia* v. *New York,* supra.
> *Report of the Joint Legislative Committee,* pp. 16, 38, 39, 40, 77, 78.

Of the milk which is produced and sold by New York dairy farmers 51 percent is eventually sold as fluid milk, 22 percent as cream and 27 percent as cheese, condensed and evaporated milk, butter, ice cream and

other manufactured products (Report of the Joint Legislative Committee, p. 83).

In 1932 the New York market received 69 percent of its milk supply and 77 percent of its cream supply from New York producers, leaving 31 percent of its milk and 23 percent of its cream supply that was supplied by other states (Report of the Joint Legislative Committee, pp. 34, 36). Milk and cream is received in New York from six other states and also from Canada (Report of the Joint Legislative Committee, p. 19).

The New York milk farmers themselves sell a part of their production to other states (Report of the Joint Legislative Committee, p. 19).

In 1930 the amount of fluid milk and cream that was consumed in New York exceeded by 17 percent the amount supplied by the New York producers, and the deficit was supplied by the other states which, together with New York, make up the New York milk shed (Report of the Joint Legislative Committee, p. 37).

The peculiar problem which confronts the New York milk farmer is the disposition of the 27 percent of his production which is utilized for non-fluid consumption since this portion of his production must meet the competition of manufactured dairy foods produced in states where costs of production are lower than New York.

Thus the report of the Joint Legislative Committee in its conclusions and recommendations reads (p. 16):

> "(d) Surplus milk is a serious problem because the prices which can be realized for it are much less than the prices realized for milk sold for consumption in fluid form or as cream. This is due to the fact that surplus milk products must be disposed of in competition with those produced in other regions where costs are lower. The prices realized for surplus milk usually are less than the prevailing costs of production in this state and the loss on this part of the milk must be made up (if at all) in a correspondingly higher price for fluid milk and cream."

The report of the legislative committee further reads at page 38, quoting from an article by Dr. H. A. Ross of Cornell University:

> "The price obtained for this surplus milk, however, is usually less than that paid for fluid milk in city markets. This is particularly true in New York, where butter, cheese, and condensed milk produced under conditions of high cost, must compete in the open market with the same products from the cheaper producing regions of the mid-West. It costs less to ship a pound of butter from Iowa to New York than to ship sufficient corn to produce that amount of butter here. Nevertheless, the availability of extensive pasture areas in the State of New York has resulted in the development of a dairy industry which, during the greater part of the year, supplies far more milk than is consumed in fluid form by the great urban population of the near-by cities. These cities have been demanding more and more milk each year, but even in 1925 only 52.1 percent of the milk handled in New York milk plants was used as fluid milk. During the same year, however, there was a period when the New York City supply was barely adequate to meet the demand for fluid milk. That is, supply and demand are not in adjustment, and seasons of shortage alternate with seasons of surplus."

And at page 108, the report, quoting from the testimony of Mr. F. H. Sexauer, president of the Dairymen's League Co-operative Association, Inc., of New York, reads:

> "'for some time it (The Dairymen's League) tried the experiment of manufacturing a large quantity of milk into condensed and evaporated milk, but the competition was so strong, especially with the condensers of the West where milk could be bought cheaply because of lower production costs, that the net return upon such manufactured milk was not commensurate with the high production costs in this territory and with the relative net return of fluid milk in the milk shed.'"

That the problem of the New York milk producer is essentially the disposal of his surplus product in competition with the manufactured dairy products of other states, where production costs are lower, is judicially affirmed by the decision of the New York Appellate Division, Fourth Department, in *Barns* v. *Dairymen's League Co-operative Association, Inc.*, 220 App. Div. 624, decided in 1927. In that case the court stated:

> "* * * it is necessary that the general situation of the milk industry be considered. The whole difficulty seems to arise from the fact that milk is a perishable product and that owing to irregularities of production and consumption there is periodically a surplus which must be manufactured into a permanent product which brings a lower price for that purpose than when marketed as fluid milk for immediate consumption" (p. 627).
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> * * * * * * *
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> "* * * the normal production of the dairies has a large seasonal variation, the output being twice as great in the months of April, May and June as it is in the corresponding months in the fall. There is likewise a daily surplus which is naturally left over in the hands of the dealers who must carry a supply sufficient to meet their daily maximum needs for fluid milk. A third surplus is found in an actual excess of production in the New York milk zone over fluid milk demands even in the short months of the year. All of this surplus must be manufactured into permanent products such as butter, cheese, evaporated milk, etc., but when it is so manufactured it comes into competition with country-wide and world-wide markets and commands a much lower price. Milk products manufactured from milk produced in the middle west, for example, carry a lower production cost because the milk is produced on cheaper land, with cheaper feed and under less restricted conditions than are required by the New York fluid milk market. The problem of the farmer therefore, who is in the New York milk zone, is the problem of disposing of his surplus to the best advantage" (pp. 627-628).

The especial protection which the New York milk farmer needed, therefore, was a protection against the competition of the milk producers of other states, and the Milk Control Statute of 1933 is essentially a scheme to ensure the New York farmer a price sufficiently high for his milk to enable him to operate at a net profit even though he have surplus milk which cannot be profitably sold.

The 1934 Law (Laws of New York, Chapter 126) entails the same protective scheme and the Milk Control Division, established by that law, is empowered to fix "the minimum prices to be paid by milk dealers to producers and others for milk in its various grades and uses" (Section 258-m [1a]).

It is clear that the protective scheme embodied in the statute could not successfully operate in the New York market which, in addition to manufactured milk products, receives 31 percent of its fluid milk supply and 23 percent of its cream supply from other states in which milk is more cheaply produced if the milk producers of those other states could sell and ship their product to the New York market without restriction.

The keystone of the protective scheme is found, therefore, in Section 312 (g) of the 1933 statute, which compels producers of other states to sell their product at the price fixed by the New York Milk Control Board if the milk is ultimately to be utilized in New York. That section reads:

> "(g) It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article on the board shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk pur-

chased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful."

(The same provision is in Section 258-m [4] of the 1934 Statute.)

The statute under which defendants' orders were issued is essentially a protective device to guard the milk farmers of New York against the competitive advantage possessed by the milk farmers of other states in which milk can be produced more cheaply than in New York. It compels the farmers of other states to sell at the same price as the New York farmer sells his milk and thus equalizes the price of local milk and milk produced outside the state in exactly the same manner as would a protective tariff. Milk can be produced in Pennsylvania so as to be sold profitably, say, for $1.00 a hundred pounds, whereas $1.50 a hundred pounds is necessary to give a profit to the New York producer. Were New York to impose a tariff of 50 cents on each 100 pounds of Pennsylvania milk in order to equalize the prices of the New York and Pennsylvania product, the money received would go to the New York State Treasury. In that respect the present law differs from a tariff law, but there is no difference between the present law and such tariff law insofar as each operates equally as a discrimination against the products of other states, for each law takes from the producers of the other states the competitive advantage possessed by them over the New York farmer. The statute, therefore, is nothing more or less than a device to protect the New York farmer against the competition of the producers of other states, and is invalid for it contravenes the rule that no state may validly enact a law which discriminates against the products of other states.

Texas Co. v. *Brown,* 258 U. S. 466.
Darnell & Son v. *Memphis,* 208 U. S. 113, 120, 125.

Brimmer v. *Rebman*, 138 U. S. 78.
Guy v. *Baltimore*, 100 U. S. 434.
Welton v. *Missouri*, 91 U. S. 275.

The orders which plaintiff is accused of violating are without legal standing therefore since they find their basis in a statute which itself lacks validity.

The specific protective device adopted by the legislature, to-wit, forbidding the sale of milk in New York which has been purchased in other states unless there paid for at the price fixed by the New York Milk Board, in itself violates the constitutional inhibition against the states imposing direct burdens on interstate commerce.

The purchase of milk in other states, and its movement into New York for sale, is clearly interstate commerce.

East Ohio Gas Co. v. *Tax Comm.*, 283 U. S. 465, 471, 472.
United States v. *Erie R. R.*, 280 U. S. 98, 101.
Foster Packing Co. v. *Haydel*, 278 U. S. 1, 10.
Shafer v. *Farmer's Grain Co.*, 268 U. S. 189.
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282, 290.

The rule is stated in *Furst* v. *Brewster*, 282 U. S. 493, 497, 498:

> "* * * every negotiation, contract, trade, and dealing between citizens of different states which contemplates and causes such importation (from one state into another) whether it be of goods, persons or information, is a transaction of interstate commerce. Such commerce comprehends all the component parts of commercial intercourse between different States * * *."

It is fundamental that the states may not validly impose any direct burden upon interstate commerce.

Furst v. *Brewster*, 282 U. S. 493.
Foster Packing Co. v. *Haydel*, 278 U. S. 1.

Di Santo v. *Pennsylvania,* 273 U. S. 34.
Minnesota Rate Cases, 230 U. S. 352, 396.

No greater burden upon interstate commerce can be imposed than is imposed by the statute in suit. The statute is not a health regulation, prescribing the quality of milk which may be sold in New York, but is an out and out attempt to fix the price at which milk may be purchased in other states, by making it unlawful to sell milk which has reached New York by way of interstate commerce, if the seller and purchaser of the milk have not complied with the terms of the New York statute. Obviously, such an enactment destroys interstate traffic unless those engaged therein are willing to comply with the local law, for no purchases will be made of milk which cannot ultimately be resold.

Accordingly in *G. A. F. Seelig, Inc.* v. *Baldwin,* decided August 2, 1934, not yet reported, a Statutory Court, sitting for the Southern District of New York, ruled that the portion of the statute, attempting to regulate the price of milk produced outside of New York, was unconstitutional, as applied to milk which was being sold in New York in the "original package" in which it was received.

If the New York Milk Control Law be valid, then we are confronted with the evil of any state of the Union passing a similar statute to protect some "home industry" against the competition of the same industry carried on in another state where production costs are lower.

Such attempt by the states to favor their own industries as against the industries of other states is not idle conjecture for such interstate commercial rivalry was an ugly fact which preceded the adoption of the Constitution and the abolition of which was one of the great purposes of its framers.

In *Beard, The Rise of American Civilization,* Vol. 1, the interstate commercial rivalry existing under the Arti-

cles of Confederation and prior to the adoption of the Constitution is described as follows (p. 305):

> "* * * Worse than the monetary system were the impediments in the way of interstate commerce. Under local influences legislatures put tariffs on goods coming in from neighboring states just as on foreign imports, waged commercial wars of retaliation on one another, raised and lowered rates as factional disputes oscillated, reaching such a point in New York that duties were levied on firewood from Connecticut and cabbages from New Jersey.
>
> If a merchant surmounted the obstacles placed in his way by anarchy in the currency and confusion in tariff schedules and succeeded in building up an interstate business, he never could be sure of collections, for he was always at the mercy of local courts and juries—agencies that were seldom tender in dealing with the claims and rights of distant creditors as against the clamors of their immediate neighbors. While the Articles of Confederation lasted there was no hope of breaching such invincible barriers to the smooth and easy transaction of interstate business."

Professor Beard in the same work points out that one of the principal purposes of the framers of the Constitution was to cure the evils which resulted from the interstate commercial rivalry. The learned author states (Vol. 1, p. 324):

> "Having clearly in mind foreign discriminations and the commercial anarchy that existed among the states, the framers of the Constitution provided that Congress should have power to regulate foreign and interstate commerce, thus wiping out state tariff lines and creating a national market area behind a federal wall."

Under the Articles of Confederation the commercial rivalry between the states found expression in tariffs against the products of other states, but the same dis-

crimination which was intended to be abolished by the Constitution is equally created by a tariff and by a law such as the New York Milk Control Law, which by a different method destroys the competitive advantage enjoyed over New York milk producers by the citizens of other states.

It is of the utmost significance that even before the decision of the District Court, declaring invalid that part of the law which seeks to fix the price of milk produced outside of New York, the administrative officials entrusted with the enforcement of the law recognized the invalidity of the legislature's attempt to regulate the price of milk produced in other states and their inability to control such prices.

Thus, an article in the New York Times of January 3, 1934, read in part as follows:

> "ALBANY, Jan. 2 (AP).—With collapse of its price-control system probable unless immediate action toward adjustment is taken, the New York Milk Board moved swiftly today to obtain the cooperation of other States in regulation of the milk industry.
>
> * * * * * *
>
> The recent weakening in the board's price control has been attributed to shipments of cheap milk from other States. Efforts to place these States under a milkshed code were begun in August but have not thus far succeeded.
>
> Chairman Charles H. Baldwin of the State board said there might be difficulty in persuading States now profiting by the New York regulations to give up their profits and cooperate with New York."

Another article which appeared in the New York Times of January 8, 1934, read in part as follows:

> "Special to The New York Times.
>
> ALBANY, Jan. 7.—The New York and New Jersey Milk Control Boards have prepared a joint plan

for stabilizing the New York milk shed, which will be presented at a public hearing here tomorrow.

* * * * * *

Federal Aid Sought

'Effective control of certain aspects of the milk industry in the New York-New Jersey metropolitan milk shed necessitates the regulation of interstate commerce, which can be accomplished only by the Federal Government,' the board said."

An article which appeared in the New York Evening Post of February 9, 1934, and which was an account of a meeting of milk producers held at Syracuse, New York, reads in part:

"'They listened intently to Charles H. Baldwin, State Commissioner of Agriculture and chairman of the State Milk Control Board, and Fred H. Sexauer, president of the Dairymen's League, who told them that the whole price structure of the milk business is on the point of collapse.

Only an effective Federal agreement, and that forthcoming promptly, can avert chaos, they were told.'"

The articles to which reference has just been made were presented to the court below (R. pp. 17, 51).

Another article which appeared in the Knickerbocker Press of Albany, New York, on January 10, 1934, read in part as follows:

"His representatives are in Washington to enlist the help of President Roosevelt in speeding federal aid in controlling the milk market, Governor Lehman yesterday told 1,200 grim-faced dairymen as threats of a new statewide milk strike were being voiced at a hearing on a proposed bi-state compact to prevent collapse of the present price structure.

* * * * * *

'We might just as well face an unpleasant situation courageously and look the facts in the face,' said Mr. Lehman. 'I feel it my duty to say to you,

> gentlemen, that I am deeply apprehensive with regard to the milk situation in this state unless we can secure federal cooperation in the working out and the administration of the problems of the several states that go to make up the New York milk shed * * *.'"

The effect of defendants' inability to control the prices of milk produced outside of the state, is to put the New York milk industry, which the statute was intended to safeguard, in a worse position than it was before the enactment of the statute. Defendants, as they have recognized, and as the District Court has held, are unable to control the price of milk produced outside of the state. The inevitable result is that dealers will make as many purchases as possible outside of the state, since they can make such purchases at any price reached by bargaining, and not at the minimum price fixed by defendants. This will increase the amount of milk purchased outside the state and decrease the purchases in New York, so that the New York milk producers, instead of being safeguarded by the law, will be injured. The evil which the legislature intended to remedy by the statute—the surplus of New York production over demand—is aggravated by the law, which in its operation causes dealers to increase their purchases in other states.

It is apparent from the statute and from what has transpired since its enactment that its price-fixing provisions are utterly ineffective to safeguard the milk industry of New York. The pressure of the supply of milk from other states, the price of which cannot be controlled, makes impossible the safeguarding of the New York industry by any price-fixing device.

The question here raised goes not merely to the validity of the section which directly pertains to milk produced in other states, but to the validity of the entire statute. The basic scheme and purpose of the statute is to protect the New York milk farmer against the competition of other states. The law, for that reason alone, is invalid

since it thereby discriminates against the products of other states. Moreover, New York cannot validly regulate the price of milk produced outside of New York, so that the whole scheme of the law necessarily falls. The New York farmer is injured instead of helped by the law so that it has no substantial relation whatever to the object sought to be attained. For this additional reason the statute is unconstitutional, since a law, to conform to due process, must "have a real and substantial relation to the object sought to be attained."

Nebbia v. *New York,* supra.
Liggett Co. v. *Baldridge,* 278 U. S. 105.
Adair v. *U. S.,* 208 U. S. 161.

POINT III.

Plaintiff did not waive its right to attack the constitutionality of the statute or of defendants' orders by applying for a license under the statute.

In the District Court defendants urged that plaintiff had waived its right to attack the statute or defendants' orders since it had applied for a license under the statute, and in connection with its application had agreed to obey the statute and orders made thereunder.

The facts do not sustain the claim of waiver.

A waiver is an intentional relinquishment of a right possessed by a party.

Bennecke v. *Ins. Co.,* 105 U. S. 355.
Rice v. *Fidelity & Deposit Co.,* 103 Fed. 427.
Balfour v. *Parkinson,* 84 Fed. 855.

Plaintiff did not first go into the milk business after the Milk Control Law went into effect. Had that been the case it might be possible to spell out an intent to waive the right of questioning the validity of the law

because of the application for a license under the statute in connection with the new venture. Plaintiff was in the milk business for many years prior to the statute (R. p. 15), and its valuable properties were particularly adapted to the carrying on of the milk business (R. p. 6).

The statute made it impossible for plaintiff to continue the use of its properties in its milk business without making application for a license, since it provides (Section 308):

> "No milk dealer, as defined in this article, shall buy milk from producers or others for sale within this state, or sell or distribute milk therein unless such dealer be duly licensed as provided in this section."

Plaintiff's application for a license under the circumstances evidenced no intent to waive its constitutional rights, for it was faced with the alternative of applying for a license as soon as the statute went into effect or abandoning its business.

The decisions of this Court indicate that there was no waiver by plaintiff. In *Abie State Bank* v. *Bryan*, 282 U. S. 765, the Court ruled that a bank which endeavored to do business under a state Bank Guarantee Act and which had proclaimed the advantages of the law did not waive its right to later attack it as unconstitutional.

In *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, the Court held that a foreign corporation by seeking a license to do business within the state does not waive its right to attack, as unconstitutional, state laws applicable to it.

In all events, plaintiff cannot be deemed to have waived its right to attack the constitutionality of defendants' orders, for when its application for a license was made these orders had not yet gone into effect (R. p.

29). An agreement, by an applicant for a license, to obey orders to be issued under a statute may properly be interpreted as an obligation to obey all orders validly made, but it cannot be deemed a promise to obey unconstitutional orders subsequently made, which are totally void and which in legal contemplation have no existence.

CONCLUSION.

The decree of the District Court should be reversed and the injunctive relief prayed for should be granted.

Respectfully submitted,

SAMUEL RUBINTON,
LEONARD ACKER,
Appellant's Counsel.

APPENDIX.

Laws of New York, 1933, Chapter 158.

Section 312.

§ 312. **Order fixing price of milk.** (a) The board shall ascertain by such investigations and proofs as the emergency permits, what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, having special regard to the health and welfare of children, and be most in the public interest. The board shall take into consideration all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer.

(b) The board after making such investigation shall fix by official order the minimum wholesale and retail prices and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state for fluid consumption, and wheresoever produced, including the following classes:

1. By milk dealers to consumers.

2. By milk dealers to stores either for consumption on the premises or resale to consumers.

3. By stores to consumers except for consumption on the premises where sold.

4. When, pursuant to statute, regulations adopted thereunder, or ordinance, various grades of milk are specified, the board shall fix the minimum price and may fix the maximum price applicable to each in each of the foregoing classes. Orders fixing minimum and maximum prices may vary in different markets and shall designate the markets to which applicable.

(c) It is the intent of the legislature that the public emergency requires that the benefits of any increase of prices received by milk dealers by virtue of the minimum price provisions of this section shall be given to producers. To that end, if the board after investigation made either upon its own initiative or upon complaint of a representative group of producers supplying a particular dealer shall determine that such milk dealer purchasing milk from producers or from or through a cooperative corporation of producers organized under or subject to the provisions of chapter seventy-seven of the consolidated laws, in making such purchases has failed to give fair and reasonable effect to such intent, the board shall, upon due notice and after a hearing suspend or revoke the license of the milk dealer so offending and in addition thereto, a violation of this subdivision shall render such offending milk dealer subject to the provisions of section three hundred seven of this article.

(d) The board after making such investigation either on its own initiative or on complaint of a representative group of producers supplying a particular dealer or a particular market may fix by official order the minimum prices to be paid by milk dealers to producers and others for milk of the various forms included within the definition of milk as used in this article and its various grades and uses. The order of the board with respect to the minimum prices to be paid to the producers and others shall apply to the locality or zone in which the milk is produced, the market or markets in which the milk so produced is sold and may vary in different localities or markets according to varying uses and differing conditions. Each such order may classify such milk by forms, classes, grades or uses as the board may deem advisable and may specify the minimum prices therefor.

(e) After the board shall have fixed prices to be charged or paid for milk in any form included in the definition of

milk as used in this article whether by class, grade or use, it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less or more than such price, or prices as shall be applicable to the particular transaction, whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise, except as provided in subdivision c of section three hundred and seventeen of this article.

(f) The board may upon its own motion or upon application from time to time alter, revise or amend an official order theretofore made with respect to the prices to be charged or paid for milk. After making such investigation and before making, revising or amending any order fixing the price to be charged or paid for milk, the board shall give a hearing thereon to all parties interested upon reasonable notice to such interested parties and to the public of such hearing in such newspaper or newspapers as in the judgment of the board shall afford sufficient notice and publicity. Such order of the board may be reviewed by certiorari order at the instance of any aggrieved person appearing of record at the hearing either in person or by personal representative and opposing the making of the order.

(g) It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exer-

cise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article on the board shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful.

Section 317 (c).

§ 317 (c) It shall not be unlawful for any milk dealer who, at the time this act shall take effect, is engaged in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants, to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed by the board for such sales to stores in such a city.